lawfully vested in the Vigilante Corps functions and duties relating to civil defence.

Does it also follow from this conclusion that the appellant was entitled to an acquittal on the charge? He was convicted of desertion, *i.e.* being unlawfully absent from duty at Civil Defence School II, Mandai Road, for a period of 50 days under section 15(1) (now section 14(1)) of the Vigilante Corps Act. On the evidence, it would appear that the appellant's duty at Civil Defence School II was to be trained in construction work for the purpose of civil defence duties. To the extent that the Vigilante Corps were not, as I have held, vested with duties relating to civil defence, at that time, he could not have been compelled to submit himself to such training for such purpose.

To this extent, I think the defence succeeds. However, on the evidence, it is abundantly clear that he was absent without leave from his place of duty. He was under a lawful duty to report to and remain at Civil Defence School II even though he was not under a lawful duty to undergo civil defence training. It is, therefore, clear that the appellant had committed an offence under paragraph 10 of the Schedule to section 24 of the Vigilante Corps Act which provides for the offence of absence without leave in the following terms:

"10. Absents without leave or good cause from service or from the place where he is lawfully required for the time being to be."

In the circumstances, I substitute for the conviction under appeal a conviction under section 24(1) of the Vigilante Corps Act of being absent from the place where he was lawfully required for the time being to be.

As for the sentence, I agree with the submission of the deputy public prosecutor that the district judge erred in law in treating detention in a drug rehabilitation centre as being equivalent to imprisonment for the purpose of serving out a sentence of imprisonment under section 223 of the Criminal Procedure Code. Unless such a centre is gazetted as a prison under the Prisons Act, it is not a prison for the purpose of serving a term of imprisonment therein. Any sentence of imprisonment must commence from the date it was passed without any allowance whatever being allowed for the period of detention served by the appellant in a drug rehabilitation centre.

I will now hear submissions on the sentence.

*Appeal against conviction allowed.*

*Note:* After hearing the submission on sentence, the court sentenced the appellant to two months' imprisonment with effect from 1 June 1988 in view of the appellant's failure to serve national service which the court considered was a serious offence.

Solicitors: *Wee Tay & Lim.*

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## KEVIN DESMOND DE SOUZA & ORS. v. THE MINISTER OF HOME AFFAIRS & ORS.

**[O.Cr.J. (Lai Kew Chai J.) 27 May 1988]**

**[Singapore – Originating Motions Nos. 54, 55 & 56 of 1988]**

*Administrative Law – Detention without warrants – Suspension orders – Re-arrests upon issue of joint statement denying offence – Writ of habeas corpus ad subjiciendum – Whether detentions and re-arrests illegal or improper – Judicial review – Internal Security Act (Cap. 143, 1985 Ed.), ss. 8(1), 10 & 11 – Interpretation Act (Cap. 1, 1985 Ed.), s. 45.*

*Preventive Detention – Detention without warrants – Suspension orders – Re-arrests upon issue of joint statement denying offence – Writ of habeas corpus ad subjiciendum – Whether detentions and re-arrests illegal or improper – Internal Security Act (Cap. 143, 1985 Ed.), ss. 8(1), 10 & 11.*

By these three originating motions, the applicants applied for writs of *habeas corpus ad subjiciendum.* The first and second applicants were arrested without warrants on 21 May 1987. The third applicant was arrested, also without warrant, a month later on 20 June 1987. They were all arrested under the Internal Security Act (Cap. 143, 1985 Ed.) ("the Act") and remained in police custody during which time they were interrogated and statements were taken from them. The first and second applicants remained in police custody until 19 June 1987 when on that day the Minister for Home Affairs made two orders under section 8(1) of the Act that they be forthwith detained for a period of one year from 20 June 1987. The third applicant was also detained forthwith for a period of one year with effect from 19 July 1987 under a ministerial detention order made on 18 July 1987. Copies of the orders of detention were duly served on each of the three applicants together with a statement pursuant to section 11 of the Act setting out the respective grounds and alleged facts on which the detention orders were made. On 26 September 1987, the Minister, in exercise of the powers conferred on him by section 10 of the Act, directed that the operation of the said orders be suspended subject to the execution of a bond and compliance with certain conditions. On 18 April 1988, the three applicants and five other ex-detainees signed and issued a joint statement to the media and others. In that statement they, *inter alia,* denied that they were Marxist conspirators involved in the Marxist plot. On 19 April 1988, the Minister in exercise of the powers conferred by section 10 of the Act revoked all three directions dated 26 September 1987 as he was "satisfied that it was necessary to do so in the public interest in view of a joint statement issued by the three applicants". In consequence, the applicants were re-arrested and remained in detention at the Whitley Road Centre as directed by the Minister.

**Held**, dismissing the applications: (1) courts of justice must give effect to the following propositions when engaged in reviewing cases involving national security:

(i) the subjective determination of the Minister is not justiciable;

(ii) courts have refused to review the exercise of Ministerial discretion when its validity is challenged in *habeas corpus* proceedings;

(iii) courts cannot examine or investigate the sufficiency of the matters upon which the subjective satisfaction of the Minister is or is purported to be grounded, but can examine the grounds disclosed by the Minister to see and ensure that there has been no illegality, irrationality or procedural impropriety;

(iv) subject to the foregoing, those who are responsible for national security must be the sole judge of what national security requires;

(2) the burden of proving lawful detentions lay on the respondents and this they had discharged by relying on the detention orders. Once this was shown, it was for the applicants to allege and show that the power was exercised without the subjective satisfaction of the President. This assertion of fact must be properly made on behalf of the applicants in an affidavit;

(3) the learned judge rejected all the five grounds of submission put forward by the applicants' counsel, ordered the applications to be dismissed with costs to be taxed on only two motions and paid by the three applicants equally.

*Cases referred to:*

(1) *Council of Civil Service Unions & Ors.* v. *Minister for the Civil Service* [1985] A.C. 374 (cited).
(2) *Chief Constable of the North Wales Police* v. *Evans* [1982] 1 W.L.R. 1155 (follD).
(3) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 M.L.J. 129 (refd).
(4) *Liversidge* v. *Anderson* [1942] A.C. 206 (refd).
(5) *Greene* v. *Secretary of State for Home Affairs* [1942] A.C. 284 (refd).
(6) *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50 (refd).
(7) *R.* v. *Secretary of State for Home Department, ex parte Ruddock* [1987] 2 All E.R. 518 (refd).
(8) *Leong Kum Fatt* v. *Attorney-General, Singapore* [1986] 1 M.L.J. 7 (refd).
(9) *O'Reilly* v. *Mackman* [1983] 2 A.C. 237 (refd).
(10) *Lee Mau Seng* v. *Minister for Home Affairs, Singapore & Anor.* [1971] 2 M.L.J. 137 (cited).
(11) *Khawaja* v. *Secretary of State* [1983] 2 W.L.R. 321; [1984] 1 A.C. 74 (distd).

ORIGINATING MOTIONS.

*Geoffrey Ronald Robertson* Q.C. (*George Lim* with him) for the applicant in Originating Motion No. 54/88.

*Geoffrey Ronald Robertson* Q.C. (*Rajan Nair* with him) for the applicant in Originating Motion No. 55/88.

*Geoffrey Ronald Robertson* Q.C. (*Peter Low* with him) for the applicant in Originating Motion No. 56/88.

*S. Tiwari* (Senior State Counsel) (*Soh Tze Bian* and *Joyce Huen (Miss)* with him) for the respondents.

*Cur. Adv. Vult.*

**Lai Kew Chai J.**: By three originating motions heard on Monday, 23 May 1988, the applicants applied for writs of *habeas corpus ad subjiciendum*. If they could show that their detentions were illegal or improper, such writs would issue.

The applicant, Kevin Desmond de Souza, a law graduate about to complete his pupillage, and the second applicant, Madam Wong Souk Yee, who was actively engaged in stage drama, were arrested without warrants on 21 May 1987. The third applicant, Ms Chng Suan Tze, a lecturer in the Singapore Polytechnic who was also actively engaged in stage drama with Madam Wong Souk Yee, was arrested also without a warrant a month later on 20 June 1987. They were all arrested under the Internal Security Act (Cap. 143, 1985. Ed.) ("the Act") and remained in policy custody during which time they were interrogated and statements were taken from them. The first two applicants remained in police custody until 19 June 1987 when on that day the Minister for Home Affairs made two orders under section 8(1) of the Act that they be forthwith detained for a period of one year from 20 June 1987. The third applicant was also detained forthwith for a period of one year with effect from 19 July 1987 under a ministerial detention order made on 18 July 1987.

The order of detention in respect of the first applicant is as follows:

"The Internal Security Act
(Chapter 143)

Order of Detention under Section 8(1)(a)

To : The Director of Prisons, Singapore

and to : The Commissioner of Police, Singapore, all other police officers and to all others whom it may concern.

Whereas the President is satisfied with respect to one De Souza Kevin Desmond NRIC No. 1470341-A of 200 West Coast Road, # 02-03, Singapore 0512 that, with a view to preventing him from acting in any manner prejudicial to the security of Singapore or to the maintenance of public order or essential services therein, it is necessary to detain him:

Now, therefore, the Minister for Home Affairs, in exercise of the powers conferred on him by section 8 of the Internal Security Act, has directed –

(a) under subsection (1)(a) of section 8 of the Act that the said De Souza Kevin Desmond be detained for a period of one year* with effect from the 20th day of June 1987; and

(b) under subsection (4) of section 8 of the Act that the said De Souza Kevin Desmond be detained at Whitley Road Centre or at such other place as he may from time to time direct.

Made this 19th day of June 1987.

Sgd: Cheong Quee Wah
Permanent Secretary
Ministry of Home Affairs
Singapore

*Insert period not exceeding two years."

The order of detention in respect of the second applicant is as follows:

"The Internal Security Act
(Chapter 143)

Order of Detention under Section 8(1)(a)

To : The Director of Prisons, Singapore

and to : The Commissioner of Police, Singapore, all other police officers and to all others whom it may concern.

Whereas the President is satisfied with respect to one Wong Souk Yee NRIC No. 1284988-E of Blk 52 Telok Blangah Drive # 20-86, Singapore 0410 that, with a view to preventing her from acting in any manner prejudicial to the security of Singapore or to the maintenance of public order or essential services therein, it is necessary to detain her:

Now, therefore, the Minister for Home Affairs, in exercise of the powers conferred on him by section 8 of the Internal Security Act, has directed –

(a) under subsection (1)(a) of section 8 of the Act that the said Wong Souk Yee be detained for a period of one year* with effect from the 20th day of June 1987; and

(b) under subsection (4) of section 8 of the Act that the said Wong Souk Yee be detained at Whitley Road Centre or at such other place as he may from time to time direct.

Made this 19th day of June 1987.

Sgd: Cheong Quee Wah
Permanent Secretary
Ministry of Home Affairs
Singapore

*Insert period not exceeding two years."

The order of detention in respect of the third applicant is as follows:

"The Internal Security Act
(Chapter 143)

Order of Detention under Section 8(1)(a)

To : The Director of Prisons, Singapore

and to : The Commissioner of Police, Singapore, all other police officers and to all others whom it may concern.

Whereas the President is satisfied with respect to one Chng Suan Tze NRIC No. 0149356-F of Apt Blk 102 Henderson Crescent # 04-18 Singapore 0315 that, with a view to preventing her from acting in any manner prejudicial to the security of Singapore or to the maintenance of public order or essential services therein, it is necessary to detain her:

Now, therefore, the Minister for Home Affairs, in exercise of the powers conferred on him by section 8 of the Internal Security Act, has directed –

(a) under subsection (1)(a) of section 8 of the Act that the said Chng Suan Tze be detained for a period of one year* with effect from the 19th day of July 1987; and

(b) under subsection (4) of section 8 of the Act that the said Chng Suan Tze be detained at Whitley Road Centre or at such other place as he may from time to time direct.

Made this 18th day of July 1987.

Sgd: BG Tan Chin Tiong
Permanent Secretary
Ministry of Home Affairs
Singapore

*Insert period not exceeding two years."

Copies of the orders of detention were duly served on each of the three applicants and at the same time each of them was furnished with a statement in writing as required by section 11 of the Act. As the grounds on which each detention order was made and the allegations of fact asserted against each of the applicants are in some material respects distinctive in each case, I have to set them out in seriatim.

The statement applicable to the first applicant is as follows:

"Statement required under Section 11(2)(b) of The Internal Security Act (Cap. 143, 1985 Ed.)

Detainee's Name: Kevin Desmond De Souza

Grounds on which a Detention Order is made

Between 1985 and May 87, you acted in a manner prejudicial to the security of Singapore by being involved in a Marxist conspiracy to subvert the existing social and political system in Singapore, using communist united front tactics, with a view to establishing a Marxist state.

Allegation of Fact

1 That since 1985, you came under the influence of Vincent Cheng, the central figure in the Marxist conspiracy, and had subsequently participated in activities to further the conspiracy.

2 That since Jan 86, you have been involved, together with Vincent Cheng, in the Coalition of Organizations for Religion and Development (CORD), to exert influence and control over Catholic organizations and their leaders so that they could become a political pressure group and part of a united front to subvert the existing social and political system.

By the Direction of the Minister for Home Affairs.

Sgd: Cheong Quee Wah
Permanent Secretary
Ministry of Home Affairs
Singapore"

The statement applicable to the second applicant is as follows:

"Statement required under Section 11(2)(b) of The Internal Security Act (Cap. 143, 1985 Ed.)

Detainee's Name: Wong Souk Yee (f)

Grounds on which a Detention Order is made

Between 1983 and May 87, you acted in a manner prejudicial to the security of Singapore by being involved in a Marxist conspiracy to subvert the existing social and political system in Singapore, using communist united front tactics, with a view to establishing a Marxist state.

Allegation of Fact

That you, in collaboration with a few ex-activists of the Federation of United Kingdom and Eire, Malaysian and Singapore Students' Organizations (FUEMSSO), who were members of Tan Wah Piow's Marxist discussion group in the United Kingdom, established the drama group Third Stage, in Singapore, in 1983, with the purpose of using it as a vehicle to subvert the existing socio-political system.

By the Direction of the Minister for Home Affairs.

Sgd: Cheong Quee Wah
Permanent Secretary
Ministry of Home Affairs
Singapore"

The statement applicable to the third applicant is as follows:

"Statement required under Section 11(2)(b) of The Internal Security Act (Cap. 143, 1985 Ed.)

Detainee's Name: Chng Suan Tze (f)

Grounds on which a Detention Order is made

You acted in a manner prejudicial to the security of Singapore:

(a) by being involved, between 1975 and 1981, in the pro-communist activities of the Student Christian Movement of Singapore (SCMS);

(b) by being involved, between 1984 and May 1987, in a Marxist conspiracy to subvert the existing social and political system in Singapore, using communist united front tactics, with a view to establishing a Marxist state.

Allegation of Fact

1 That you were, from 1975 till 1981, involved in the pro-communist activities of the SCMS. As a founder member of Gendang Enterprises, a cultural group formed by the SCMS, you were involved in Gendang's activities which included singing progressive songs and performing plays which exaggerated the plight of the poor and the inadequacies of the existing system.

2 That while studying in the United Kingdom from 1981 to 1983, you came under the influence of Tan Wah Piow. You supported Tan Wah Piow's idea of using drama as a means to reach out and radicalize the public in Singapore and on his suggestion, you joined the drama group Third Stage in 1984 following your return to Singapore. Since then till May 87, you played a prominent role in making use of Third Stage as a tool to arouse disaffection among the people towards the existing socio-political system.

By the Direction of the Minister for Home Affairs.

Sgd: BG Tan Chin Tiong
Permanent Secretary
Ministry of Home Affairs
Singapore"

Although the orders of detention were effective for one year, all three applicants remained in detention, subject to the events hereinafter recited only until 26 September 1987 when on that day the Minister for Home Affairs, in exercise of the powers conferred on him by section 10 of the Act, directed that the detention orders be suspended subject to certain conditions. All three directions suspending the orders of detention were similar in tenor subject to the necessary changes and, with these necessary changes in mind, I shall only reproduce below the said direction in respect of the first applicant as follows:

"The Internal Security Act
(Chapter 143)

Direction under Section 10 Suspending Order of Detention

Whereas by an Order made by the Minister for Home Affairs on the 19th day of June 1987, under section 8(1)(a) of the Internal Security Act, De Souza Kevin Desmond NRIC No. 1470341/A of 200 West Coast Road, # 02-03, Singapore 0512 was detained for a period of one year, with effect from the 20th day of June 1987:

Now, therefore, the Minister for Home Affairs, in exercise of the powers conferred on him by section 10 of the said Act, has directed that the operation of the said order be suspended, with effect from the 26th day of September 1987, subject to the execution of a bond and to the following conditions:

(i) that he shall not travel beyond the limits of Singapore without the prior written approval of the Director, Internal Security Department, Singapore;

(ii) that he shall not, except with the written consent of the Director, Internal Security Department, be a member of any society within the meaning of the Societies Act (Cap. 311) or in any way assist in the activities of any society;

(iii) that he shall not associate with or take part in, or in any way assist in the activities of any organization which through its publications, statements or other activities, has shown itself to be used in propagating Marxism or communism.

Made this 26th day of September 1987.

Sgd: BG Tan Chin Tiong
Permanent Secretary
Ministry of Home Affairs
Singapore"

On 18 April 1988, the three applicants and five other ex-detainees signed and issued a joint statement to the media and others. In the statement, they denied that they were Marxist conspirators involved in the Marxist plot. They claimed that the government had fabricated the story of the Marxist plot and had tortured the detainees to compel them to admit falsehoods. These were, indisputably, very serious allegations.

On 19 April 1988, the Minister for Home Affairs, in exercise of the powers conferred on him by section 10 of the Act, revoked all three directions dated 26 September 1987 as he was "satisfied that it was necessary to do so in the public interest in view of a joint statement issued by" the three applicants. A copy of the said notice of revocation in respect of the first applicant, which is in substance similar to the other two notices, is as follows:

"The Internal Security Act
(Chapter 143)

Revocation under Section 10 of Suspension Direction

Whereas by an order made by the Minister for Home Affairs on the 19th day of June 1987, under section 8(1)(a) of the Internal Security Act, De Souza Kevin Desmond NRIC No. 1470341-A of 200 West Coast Road, #02-03, Singapore 0512, was detained for a period of one year, with effect from the 20th day of June 1987:

And whereas on the 26th day of September 1987, the Minister for Home Affairs in exercise of the powers conferred on him by section 10 of the said Act directed that the operation of the said order be suspended, with effect from the 26th day of September 1987, subject to the execution of a bond and compliance with certain conditions.

And whereas on the 18th day of April, 1988, the said De Souza Kevin Desmond issued a joint statement, inter alia, denying any involvement in a Marxist conspiracy.

And whereas the Minister for Home Affairs is satisfied that in view of the statement it is necessary in the public interest that the direction dated the 26th day of September 1987 should be revoked.

Now, therefore, the Minister for Home Affairs in exercise of the powers conferred on him by section 10 of the said Act hereby revokes the direction dated the 26th day of September 1987 with effect from the 19th day of April 1988.

Made this 19th day of April 1988.

Sgd: BG (Res) Tan Chin Tiong
Permanent Secretary
Ministry of Home Affairs
Singapore"

In consequence, the applicants were re-arrested and they have remained in detention at the Whitley Road Centre as directed by the Minister for Home Affairs.

BG Tan Chin Tiong, the Permanent Secretary, Ministry of Home Affairs, in his affidavit affirmed that the suspension directions were revoked by the Minister because of concern for national security. He drew attention to the third and fourth preambles of the revocation orders and to the press statement of 20 April 1988 from the Ministry of Home Affairs. BG Tan Chin Tiong quoted the following passage from the press statement:

> The detainees now claim that everything they did was legal and legitimate. When they claim, or worse if they truly believe, that they have done nothing wrong, there is every likelihood that they will resume their former activities.

The Act, which was duly enacted under the Constitution of Singapore, was promulgated for the purposes of preventing and combating subversions and any conduct prejudicial to public order and national security. As its underlying philosophy is prevention, it is a precautionary measure and the executive, on whom national security is entrusted, must therefore, *inter alia*, seek out and anticipate security-related problems and deal with them on the basis that prevention is better than cure. Common sense dictates that the sort of problems which national security involves,

nearly at all times, if not always, do not lend themselves to the judicial process and the last word, subject to what follows in this judgment, must rest with those who are responsible for national security and not with the courts of justice. It bears emphasis that these are not merely my own notions. The late Lord Diplock, whose eminence in the field of judicial review and national security, and indeed in any other branch of the law, is difficult to equal let alone surpass, had this to say recently on the same question in the celebrated case of *Council of Civil Service Unions and Others* v. *Minister for the Civil Service,*[1] more popularly known as "the GCHQ case", at p. 412 as follows:

"The reason why the Minister for the Civil Service decided on 22 December 1983 to withdraw this benefit (ie the benefit of civil service union membership to staff of the British security headquarters at Cheltenham, UK) was in the interests of national security. National security is the responsibility of the executive government; what action is needed to protect its interests is, as the cases cited by my learned friend, Lord Roskill, establish and common sense itself dictates, a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves."

(words within brackets added)

In order to understand the arguments canvassed on behalf of the applicants, I will have to set out the material provisions of the Act to which references have been made earlier.

So far as they are relevant for present purposes, sections 8 and 11 of the Act are as follows:

"8.(1) If the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore or any part thereof or to the maintenance of public order or essential services therein, it is necessary to do so, the Minister shall make an order –

(a) directing that such person be detained for any period not exceeding two years; or

...

(2) The President may direct that the period of any order made under subsection (1) be extended for a further period or periods not exceeding two years at a time.

...

11.(1) A copy of every order made by the Minister under section 8(1)(a) shall as soon as possible after the making thereof be served on the person to whom it relates, and every such person shall be entitled to make representations against the order to an advisory board.

(2) For the purpose of enabling a person to make representations under subsection (1) he shall, within 14 days of the service on him of the order –

(a) be informed of his right to make representations to an advisory board under subsection (1); and

(b) be furnished by the Minister with a statement in writing –

(i) of the grounds on which the order is made;

(ii) of the allegations of fact on which the order is based; and

(iii) of such other particulars, if any, as he may in the opinion of the Minister reasonably require in order to make representations against the order to the advisory board."

The material provisions of section 10 of the Act are as follows:

"10. At any time after an order has been made in respect of any person under section 8(1)(a) the Minister may direct that the operation of such order be suspended subject to the execution of a bond and to such conditions –

...

as the Minister sees fit; *and the Minister may revoke any such direction if he is satisfied ... that it is necessary in the public interest that such direction should be revoked.*"

(emphasis added)

It is now convenient to say a few words about the process of judicial review, the principles of which the applicants sought to invoke. The first thing to remember in these hearings is that this court is not sitting as an appellate court from the decisions of the President acting on the advice of the Cabinet or from the decisions of the Minister. As Lord Brightman stated in *Chief Constable of the North Wales Police* v. *Evans,*[2] at p. 1174, judicial review "is not an appeal from a decision, but a review of the *manner* in which the decision was made." (emphasis added).

It is also necessary for the edification of all concerned that I should refer to some general but learned and the latest observations on the process of judicial review. In the *GCHQ* case,[1] Lord Roskill said at pp. 414C-D to 415B-C as follows:

"Today it is perhaps commonplace to observe that as a result of a series of judicial decisions since about 1950 both in this House and in the Court of Appeal there has been a dramatic and, indeed, a radical change in the scope of judicial review. That change has been described – by no means critically – as an upsurge of judicial activism. Historically the use of the old prerogative writs of certiorari, prohibition and mandamus was designed to establish control by the Court of King's Bench over inferior courts or

tribunals. But the use of those writs, and of their successors, the corresponding prerogative orders, has become far more extensive. They have come to be used for the purpose of controlling what would otherwise be unfettered executive action whether of central or local government. Your Lordships are not concerned in this case with that branch of judicial review which is concerned with the control of inferior courts or tribunals. But your Lordships are vitally concerned with that branch of judicial review which is concerned with the control of executive action. This branch of public or administrative law has evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue. Thus far this evolution has established that executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review upon what are called, in lawyers' shorthand, *Wednesbury* principles (*see Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223). The third is where it has acted contrary to what are often called 'principles of natural justice'. As to this last, the use of this phrase is no doubt hallowed by time and much judicial repetition, but it is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting-place and be better replaced by speaking of a duty to act fairly. But that latter phrase must not in its turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as, indeed, the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken.

My noble and learned friend Lord Diplock in his speech has devised a new nomenclature for each of these three grounds, calling them respectively 'illegality', 'irrationality' and 'procedural impropriety' – words which, if I may respectfully say so, have the great advantage of making clear the differences between each ground."

I now come to consider specific judicial guidance on the scope of judicial review when specifically national security is involved. Lord Roskill said in the same case at p. 420D-G:

"My Lords, the conflict between private rights and the rights of the state is not novel either in our political history or in our courts. Historically, at least since 1688, the courts have sought to present a barrier to inordinate claims by the executive. *But they have also been obliged to recognise that in some fields that barrier must be lowered and that on occasions, albeit with reluctance, the courts must accept that the claims of executive power must take precedence over those of the individual. One such field is that of national security. The courts have long shown themselves sensitive to the assertion by the executive that considerations of national security must preclude judicial investigation of a particular individual grievance. But even in that field the courts will not act on a mere assertion that questions of national security were involved. Evidence is required that the decision under challenge was in fact founded on those grounds. That that principle exists is, I think, beyond doubt.* In a famous passage in *The Zamora* [1916] 2 A.C. 77 at 107, Lord Parker of Waddington, delivering the opinion of the Judicial Committee, said:

'Those who are responsible for national security must be the sole judges of what national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.'

(my emphasis)

In my opinion, courts of justice must, accordingly, give effect to the following propositions when engaged in reviewing cases involving national security:

(1) The subjective determination of the Minister is not justiciable: see *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia.*[3]

(2) Courts have refused to review the exercise of ministerial discretion when its validity is challenged in *habeas corpus* proceedings: see *Liversidge* v. *Anderson*[4] and *Greene* v. *Secretary of State for Home Affairs.*[5]

(3) Courts cannot examine or investigate the sufficiency of the matters upon which the subjective satisfaction of the Minister is or is purported to be grounded but can examine the grounds disclosed by the Minister to see and ensure that there has been no illegality, irrationality or procedural impropriety: see *Teh Cheng Poh* v. *Public Prosecutor,*[6] at p. 55CF per Lord Diplock and the *GCHQ* case.[1]

(4) Subject to the foregoing, those who are responsible for national security must be the sole judges of what national security requires: see the *GCHQ* case[1] and *R.* v. *Secretary of State for Home Department, ex parte Ruddock.*[7]

The submissions made on behalf of the applicants in these proceedings appear to cover the three grounds gathered together by Lord Diplock and Lord Roskill in the celebrated *GCHQ* case,[1] namely (1) illegality in the sense that there was an error of law, for example see the contention, as advanced here, that the powers of a section in the Act was used by the Minister for a collateral purpose; (2) irrationality in the *Wednesbury* sense; and (3) procedural impropriety. It is well-known that Lord Diplock did not intend this three-fold categorization to be exhaustive. Also, I

should mention generally that the procedure and some matters of principles for judicial review in Singapore are significantly different from those in England: see *Leong Kum Fatt* v. *Attorney-General, Singapore*[8] and *O'Reilly* v. *Mackman*.[9] All three grounds were invoked by Mr Robertson to challenge the decisions of the Minister in making the revocation orders. However, none of these usual grounds for judicial review was invoked to challenge the validity of the detention orders made in June and July last year, save for the fifth and last ground which I will later consider.

The fourth submission which was advanced on behalf of the applicants turned on the true and natural construction of the powers, if any, of the Minister under section 10 of the Act after he had revoked the suspension directions. Mr Robertson urged the court to rule that after revocation there were no statutory power and mechanism which authorized the re-arrests and detentions of the applicants.

The final submission was that the respondents had failed to adduce any proof of the subjective satisfaction of the President after having acted on the advice of the Cabinet as required by section 8(1) of the Act pursuant to which the Minister had issued the detention orders. This technical argument, which concerned the matters prior to the making of the detention orders, may be grouped under the heading of "illegality" (meaning error of law) as formulated by Lord Diplock.

I will now consider each of the five grounds relied upon to justify the issue of the writs of *habeas corpus*. Mr Robertson opened his submissions by saying that the Minister's decisions to revoke the suspension directions were irrational in the sense that the powers of revocation were exercised in so unreasonable a manner that they should be struck down by this court. He submitted that the applicants in issuing the joint statement had done nothing subversive or prejudicial to the security of the Republic. He said they were merely exercising their constitutional right of freedom of expression and it was in fact a matter of public interest if they were, as here, proclaiming their innocence of any involvement in the alleged Marxist conspiracy. Mr Robertson levelled several criticisms of the passage relied on by BG Tan Chin Tiong which referred to the likelihood of the detainees resuming their former activities. First, he criticized the reasoning in the passage as a piece of *non sequitur*, stressing that it was wrong to say that they were guilty simply because they were proclaiming their innocence. The short answer is that plainly the passage was a piece of judgment and anticipation which was the responsibility of the security service and the Minister to determine and I cannot by any stretch of imagination say that it was in any way an unreasonable view. Secondly, Mr Robertson said that it was wrong as a fact for the Minister in his ministry's press statement to have said that "(t)he detainees *now* claim that everything they did was legal and legitimate." He observed that the applicants had all along in their written representations to the advisory board, and the Minister had known since last September, that they were denying any complicity in the Marxist plot. It was also argued that in suspending the detention orders, the Minister had mentioned that he was satisfied that the applicants were sufficiently rehabilitated to the extent that they were unlikely to act in a manner prejudicial to the security of the Republic. In view of the joint statement and its implications, which are manifestly matters solely for the professionals in the security service and the Minister to assess, it is in my view only to be expected that there could be conflicting views, that subversives would not confess and that the suspension directions could be liable to be revoked. The nature and scope of such enquiries and determinations, involving consideration of confidential statements taken and gathered in the course of security operations, make it quite clear that the judicial process is not suited to an inquiry and determination of this kind. It was further urged on behalf of the applicants that they had not broken any of the conditions imposed on them, that there was no evidence that they had or could resume their former activities, that Madam Wong Souk Yee's request to return to drama activities in The Third Stage was in fact refused and that it was, on the contrary, a matter of public interest that they should say publicly that they were innocent or that they had been ill-treated during their interrogation. Quite obviously, the Minister and his Internal Security Department could, as they did, reasonably take the contrary view. Full coverage of the matters were given in the media, both the press and television. No one other than those charged with the responsibility of national security could properly determine (a) if all the relevant facts amounted to a Marxist conspiracy and (b) the role played by each of the detainees. It would be contrary to established principles for this court to substitute its decision for that of the Minister. However, the executive does not have, and I venture to say that no constitutional government in Singapore should want, a free hand completely untrammelled by any restraint. There is in Singa-

pore in addition to the bar of public opinion and parliamentary accountability, a "true safeguard" which was identified in *Lee Mau Seng* v. *Minister for Home Affairs, Singapore and Anor.*[10] where the Chief Justice said at p. 145 as follows:

"Apart from the mandatory requirement of a consideration by this advisory body, within three months of a person's detention, of his representations against the order of detention, the true safeguard that the Constitution and the Act provides, and is intended to provide, to the individual in respect of his fundamental right to liberty is that the power and the discretion to arbitrarily detain him without trial is conferred on the highest executive body in the country and on no other body or person."

For the sake of completeness, I am constrained to refer to the argument reiterated by Mr Robertson that there must be grave doubt if the actions of the Minister in revoking the suspension directions were rational or reasonable and that the burden of proof on the respondents was or must be high, for which he relied on *Khawaja* v. *Secretary of State.*[11] It was there held that on an application for judicial review of an order detaining a person as an "illegal entrant" it was for the executive to prove to the satisfaction of the court on a balance of probabilities the facts relied on by the immigration officer as justifying his conclusion that the applicant was an "illegal entrant" within section 33(1) of the UK Immigration Act 1971. Unlike a case involving national security, fraught with the problems recognized by courts of justice, the issue in the *Khawaja* case was one for which the judicial process was eminently suited to determine. By way of contrast, I would refer to the decision of Taylor J. in *R.* v. *Secretary of State for Home Department, ex parte Ruddock.*[7] One of the three applicants in that case, who was a member of the Communist Party in England and a prominent member of the Campaign for Nuclear Disarmament, failed to satisfy the learned judge that the Secretary of State in presumably wire-tapping him had acted with an improper motive or had deliberately flouted the official criteria established for wire-tapping. It should be highlighted that the decision of the learned judge was made in spite of the uncompromising stand taken by the Secretary of State for Home Department that as a matter of policy and in the interest of national security, he declined to confirm or deny the existence of a warrant under his hand to authorize the wire-tapping. In other words, he chose to say nothing on that issue. *Khawaja*'s case was conspicuous in its lack of mention in the judgment of Taylor J. For the same reasons, *Khawaja's* case does not assist the applicants in these proceedings.

I now turn to the second way in which Mr Robertson sought to invalidate the Minister's orders of revocation. He made the bold but bald claim that the orders were made *mala fide*, that they were made for the collateral purposes of "getting to the bottom" of allegations of police misconduct and that they were made to prevent political embarrassment. This submission is totally devoid of any merit because there is not an iota of evidence which would go to show that the powers of revocation were invoked for any consideration other than those of national security.

Thirdly, the applicants claimed that they had not been treated fairly. They said that they were entitled to the legitimate expectation, a principle expounded in the *GCHQ* case,[1] that the suspension directions in their favour would not be revoked unless they had breached any of the conditions imposed or unless they had re-involved themselves in subversive activities. Well, they kept repeating that their joint statement criticizing the police or the government was not subversive. On the other hand, the executive entrusted with national security has asserted that there was a real likelihood of a resumption of their former activities which the executive had found was a Marxist conspiracy and that the applicants were conspirators in that plot. In my judgment, there is no evidence to show that the Minister had indicated, let alone agreed, that he would not revoke the suspension directions even if the rehabilitation of the applicants had by reason of subsequent events become questionable. The principle of legitimate expectation, that is of fair dealing, requires that a promise or undertaking given by a Minister as to how he would proceed should be kept: see *R.* v. *Secretary of State for the Home Department, ex parte Ruddock*[7] at pp. 519g-j to 530a-b. The proposition is unexceptional. On the facts, I find there is no basis whatsoever in these proceedings on which the Minister may be criticized in this regard.

Fourthly, I turn to the argument based on the interpretation of section 10 as canvassed by Mr Robertson. He submitted that the proper construction is that after the revocations there was no power to re-arrest and detain the applicants. He pointed to section 10 of the Malaysian Internal Security Act which contains the following additional provisions: "... and in any such case the revocation of the suspension shall be sufficient authority to any police officer to re-arrest without warrant the person against whom the detention order was made, and that person shall as soon as practicable

be returned to his former place of detention or, if the Minister so directs, sent to another place of detention." He also mentioned that section 15(3) of the National Security Act 1980 of India also provided for the machinery in the event of a revocation of a suspension of the detention order. As I indicated to Mr Robertson in the course of arguments, it is plain that when a direction is made, suspending the operation of the detention order pursuant to section 10 of the Act, all that happens in law is that the detention order is made inoperative for the time being. If the direction of suspension is revoked, it must logically and inexorably follow that the detention order becomes operative again and in that event detention is authorized under the detention order. In my opinion, this true and natural construction of the effect of a revocation order under section 10 of the Act is beyond argument and is entirely unaffected by provisions in other statutes.

I now turn to the final submission raised by Mr Robertson after the lunch-break on 23 May 1988. He submitted that there was no evidence that the President was satisfied after he was advised by the Cabinet as required by section 8(1) of the Act. He contended that the affidavit of BG Tan Chin Tiong had made no reference to the subjective satisfaction of the President and that the references in the relevant recitals of the detention orders were hearsay evidence, as signification of the President's satisfied state of mind could only be made by either a Minister or the Cabinet Secretary under section 45 of the Interpretation Act (Cap. 1, 1985 Ed.). He relied on the penultimate paragraph of the judgment of the Chief Justice in *Lee Mau Seng's* case.[10] In view of this gap in the evidence, the writs of *habeas corpus,* he said, must issue.

Mr Tiwari, in disagreeing, submitted that the recitals in the detention orders regarding the subjective satisfaction of the President and the affidavit of BG Tan Chin Tiong, read as a whole, sufficiently established that the President was satisfied, after having acted on the advice of the Cabinet. He also submitted that *Lee Mau Seng*'s case[10] was of no assistance to the applicants. I accept the submissions of Mr Tiwari and must reject the wholly unmeritorious argument of Mr Robertson. In addition to the reasons advanced by Mr Tiwari, I have the following additional observations to make. First, the burden of proving lawful detentions lay on the respondents and this they had discharged by relying on the detention orders: see *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia.*[13] Once this was shown, it was for the applicants to allege and show that the power was exercised without the subjective satisfaction of the President. This assertion of fact must be made by or properly made on behalf of the applicants in an affidavit. Secondly, it should be observed that BG Tan Chin Tiong had in his affidavit claimed that "(i)n the exercise of the powers under section 8" of the Act the Minister for Home Affairs had made the detention orders. Further, BG Tan Chin Tiong in paragraph 14 of his affidavit said: "... I wish to state respectfully that (the applicants were) detained and continue to be detained pursuant to section 8 of the Act because the government is satisfied that it is necessary to detain (them) with a view to preventing (them) from acting in any manner prejudicial to the security of Singapore." These depositions meant or must be taken to mean that the President was also satisfied, as under Part V of the Constitution of Singapore the government includes the President and under article 23(1) the executive authority of Singapore shall be vested in the President exercisable on the advice of the Cabinet as provided under article 21(1) thereof. These depositions on behalf of the respondents were not even mildly controverted or put in issue by any of the affidavits filed on behalf of the applicants and it is not permissible to raise this issue of fact by submissions at the bar in the absence of any factual foundation.

For these reasons, the three motions are, accordingly, dismissed with costs to be taxed on only two motions and paid by the three applicants equally.

*Order accordingly.*

Solicitors: *Wee Tay & Lim; Rajan Nair; S.K. Chua & Peter Low.*

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## TURNER (EAST ASIA) PTE. LTD. v. BUILDERS FEDERAL (HONG KONG) LTD. & ANOR. (NO. 2)

**[O.C.J. (Chao Hick Tin J.C.) 27 May 1988]**

**[Singapore – Originating Motion No. 91 of 1987]**

*Arbitration – Removal of arbitrator for misconduct – Whether arbitrator biased – Test of misconduct – "Real likelihood" or "reasonable suspicion" test – Arbitration Act (Cap. 10, 1985 Ed.), ss. 17 & 32.*

The applicants were the main contractors of a building project in Singapore. The respondents were the sub-